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**TESTIMONY ON 18-H 7718, AND IN OPPOSITION TO 18-H 7452,
RELATING TO ELECTRONIC IMAGING DEVICES
April 3, 2018**

The ACLU of Rhode Island recognizes the legitimate and serious privacy issues that are implicated by so-called “revenge porn.” At the same time, it is critical that any legislation addressing the issue be carefully crafted to prevent an impact on the legitimate exercise of First Amendment rights. For the reasons expressed by the Governor two years ago in vetoing this bill, the Attorney General’s legislation before you (H-7452) is overly broad and constitutionally problematic. In contrast, the Governor’s version (H-7718) avoids the key constitutional problems with the AG’s legislation. Therefore, our testimony will focus on the former bill.

First, it is worth emphasizing that despite allegedly being aimed at “revenge porn,” the key component of H-7452 doesn’t attempt to limit its reach to those circumstances. There is absolutely no requirement in this bill that the images be disseminated or received with any intent to harass a person. Similarly, there is no requirement that the images actually cause harm or emotional distress of any sort to somebody. In short, revenge has nothing to do with what is made a crime under this bill. Rather, at its core, a person could face a criminal record and prison time for disseminating an image that everybody acknowledges was taken knowingly and consensually, and that was not intended to cause, and did not cause, any harm.

Even more problematic, a person can be convicted of a crime under this bill merely because he or she “should have known” that the other person had a “reasonable expectation of privacy.” But it is often very difficult to parse out when an expectation of privacy is reasonable once the person has agreed to have the conduct photographed in the first place. When prison hangs in the balance, a person should not have to guess at the answer. In many instances, this will put judges and juries in the position of having to decide – often months or years after the fact in the context of an intimate relationship gone sour – at what point the dissemination of a consensually taken photo, and one that may even have initially been disseminated by the “victim,” impinged on that person’s “expectation” of privacy.

Consider some of the conduct made a crime under this bill. The hacking of nude photos of Jennifer Lawrence and other celebrities a few years ago was understandably troubling. But under this bill, any teenager or adult who looked for and shared any of those photos would be a criminal. The same is true for infamously graphic Anthony Weiner photos; once he indicated he objected to their further dissemination, it would be a crime for anybody to share them.

On a more newsworthy level, think of the haunting Vietnam War photo of the “napalm girl,” or some of the disturbing images from Abu Ghraib. The dissemination of these photos

could become a crime were this bill to pass. In an attempt to avoid the many constitutional issues raised by these newsworthy scenarios, the bill contains a few exceptions, such as when dissemination is “a matter of public concern.” But exemptions like that are exceedingly vague and do nothing to rein in the broad reach of this bill or to prevent people from being wrongfully charged for this offense. A news organization should not have to bear the burden of deciding whether to publish a photograph, knowing that the risk includes the possibility of enduring a jury trial and a criminal sentence depending on whether a jury concludes that the photo – such as a picture of naked tortured prisoners – involved a matter of public concern.

The vast majority of “revenge porn” laws across the country contain an “intent” requirement, and they have worked well to get at the core conduct that proponents claim this bill is aimed at. In fact, a court challenge to one of the handful of state laws lacking an intent requirement – in Arizona – led to the repeal of the law and passage of a new one containing an intent requirement.

We therefore urge committee members to focus on the Governor’s bill, which recognizes the dangers to a free press that the Attorney General’s broadly worded bill would create, and reject any legislation that fails to require an “intent to harm” in criminalizing this conduct.